No. 90-1449

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD F. HARRINGTON,

Petitioner,

v.

AETNA-BEARING COMPANY, a wholly-owned subsidiary of Katy Industries, Incorporated, and KATY INDUSTRIES, INCORPORATED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether it violates the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.*, for an employer to enforce a written employment contract that deprives an employee of tenure and other benefits when "the Employee reaches age 70."

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The petitioner Richard F. Harrington respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 7, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals, 921 F.2d 717 (7th Cir. 1991), appears in the Appendix hereto at App. 1-9. The opinion of the United States District Court of the Northern District of Illinois, 729 F. Supp. 1217 (N.D. Ill. 1990), appears in the Appendix hereto at App. 11-15.

JURISDICTION

The judgment of the Court of Appeals was entered on January 7, 1991. This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29

Age Discrimination in Employment Act of 1967, section 623:

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

STATEMENT OF THE CASE

On October 1, 1971 petitioner Richard F. Harrington ("Harrington") entered into a written Employment Agreement ("Agreement") with respondent Aetna-Bearing Co. ("Aetna") to serve as that company's President and Chief Executive Officer. (Complaint ¶¶7, 13; Complaint at App. 16-29.) The Agreement had a term of eighty-seven months. (Agreement ¶2; Agreement at App. 22-29.) The Agreement protected petitioner's tenure through three provisions. First, it provided that Aetna would only terminate plaintiff "for cause", which it defined as five specific types of misconduct: (1) conviction of a felony, (2) "gross and willful [sic] neglect of . . . duties", (3) "gross and willful negligence", (4) "willful and deliberate breach" of the Agreement, and (5) "willful or repeated disregard of the directions of the Board of Directors." (Complaint ¶8; Agreement ¶10.) Second, it required that if Aetna sold substantially all of its assets to another company, Aetna would "cause its obligations under said agreement to be assumed by such purchaser or purchasers of those assets." (Complaint ¶9; Agreement ¶12.) Finally, Aetna covenanted that "the rights and obligations of Aetna under this Employment Agreement shall inure to the benefit of and shall be binding upon the successors and assigns of Aetna." (Complaint ¶9; Agreement ¶13.)

On July 1, 1979 the parties amended the Agreement, extending its terms and conditions "until the Employee reaches age 70." (Amendment ¶1; Amendment at App. 29.) At that time, plaintiff was sixty years of age. The Amendment was adopted one year after the Age Discrimination in Employment Act of 1967 ("ADEA"), 29

U.S.C. §621 *et seq.*, had been amended in 1978 to extend coverage of the Act from age sixty-five to age seventy. (ADEA Amendments of 1978, Pub. L. 95-256, §2(a), Apr. 6, 1978.) Thereafter, in 1986 Congress amended the ADEA by removing the age ceiling altogether, thereby extending coverage to employees age seventy or older. (ADEA Amendments of 1986, Pub. L. 99-592, §2(a), Oct. 31, 1986.) Harrington's agreement, however, was not amended a second time, and the "age 70" provision remained intact.

Harrington's seventieth birthday fell on August 7, 1988. Shortly before that date, Harrington asked Aetna to extend the term of his contract once again; it refused to do so. (Complaint, ¶11.) After his birthday, Aetna considered his employment contract at an end, but retained him as an employee-at-will in his former position. (*Id.*) On February 7, 1989 Finson International, Inc. purchased substantially all of Aetna's assets. (Complaint ¶12.) Despite the terms of the Agreement, Aetna did not condition the sale of Aetna on Finson's assumption of the Agreement or otherwise take steps to see that the Agreement would be binding on Aetna's "successor or assignee." Harrington was discharged by Aetna on February 7, 1989 for reasons other than cause as defined in the Agreement. (Complaint ¶13.)

On May 17, 1989, Harrington filed a charge with the Equal Employment Opportunity Commission based on the above facts, alleging that his tenure had expired because of the "age 70" term in the amended Agreement, in violation of the ADEA. After more than sixty days had passed, he filed a civil action on August 15, 1989 in the United States District Court of the Northern District of Illinois alleging violation of the ADEA, plus a pendent state law claim of breach of contract. The district court

had federal question jurisdiction over the present case pursuant to the ADEA, 29 U.S.C. §626(c)(1) and 28 U.S.C. §1331. On January 30, 1990, the district court granted defendant's motion to dismiss for failure to state a claim, Fed. R. Civ. P. 12(b)(6), and ordered that judgment be entered for defendant.

The Court of Appeals affirmed the district court by a divided panel. *Harrington v. Aetna-Bearing Co., et al.*, 921 F.2d 717 (7th Cir. 1991) (per Posner, J.).

REASONS FOR GRANTING THE WRIT

Before the Seventh Circuit's decision in this case, there was no dispute following the 1986 ADEA amendments that, unless some statutory exception applied, employers could impose no age-based limits on terms and conditions of employment. The Seventh Circuit departs from this principle and holds in this case that it is not discrimination under the ADEA for an employer to confer benefits on an employee that expire on the employee's seventieth birthday.

This case is worthy of review for several reasons. First, it conflicts with every Court of Appeals decision that has held or assumed that such age-based limits are forbidden, plus the plain language of the statute since the age seventy ceiling has been removed. Second, the Seventh Circuit decision contradicts all prior ADEA case law dealing with termination of privileges of employment, including the undisputed premise of *Gregory v. Ashcroft*, 878 F.2d 598 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990),

in which all parties assumed that a mandatory retirement term for state judges would violate the ADEA if judges are deemed "employees" under the statute. Finally, review is warranted because the Seventh Circuit's decision creates a major loophole under the ADEA, which will deprive older employees of promised job security and tenure by the simple expedient of causing such promises to expire at some age certain.

The ADEA protects employees age forty and older from discrimination in connection with "terms, conditions, or privileges of employment." 29 U.S.C. §623(a)(1). This section has regularly been interpreted by lower federal courts to strike down all age-based limits to employment. For example, in *EEOC v. Wyoming Retirement System*, 771 F.2d 1425 (10th Cir. 1985), the court applied the ADEA to strike down a Wyoming statute that required state employees age sixty-five and older to apply for yearly extensions of employment. Such employees had to obtain the recommendation of their supervisors in order to qualify for such extensions. Those failing to obtain extensions would be "retired." The Tenth Circuit affirmed the district court's permanent injunction against enforcement of the statute and reinstatement of plaintiffs. *See also EEOC v. Tennessee Wildlife Resources Agency*, 859 F.2d 24 (6th Cir. 1988) (Tennessee retirement policy for wildlife officers, which required officers age 55 and older to obtain commission approval for continued employment, violates ADEA); *EEOC v. School Board of Pinellas Co.*, 742 F. Supp. 622 (M.D. Fla. 1990) (striking down state statute that changed public school teachers' employment contracts from "continuing" to "annual" when teachers turned age 70).

A case currently before the Court, *Gregory v. Ashcroft*, 898 F.2d 598 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990), relies on this same interpretation of the ADEA. In *Gregory*,

the Eighth Circuit held that Missouri's appointed judges were not "employees" within the meaning of the ADEA because they fell under the "appointee on the policy-making level" exemption of 29 U.S.C. §630(f). The Missouri State Constitution provides that appointed judges must retire at age seventy. It was conceded by all parties in *Gregory* "that if the definition of 'employee' contained in the ADEA extends to [the judges], the application to them of the mandatory retirement provision would be a violation of the Act." *Gregory*, 898 F.2d at 600. *See also EEOC v. State of Vermont*, 904 F.2d 794, 797 (2d Cir. 1990) (state judges would be "protected by the ADEA unless they fall within the exception for 'appointees on the policymaking level' "). In *Schlitz v. Commonwealth of Virginia*, 854 F.2d 43 (4th Cir. 1988), the defendant Commonwealth of Virginia even conceded the applicability of the ADEA to its retirement policy for state judges. It declared that, "as a result of the ADEA, its mandatory retirement law for judges is no longer being observed." *Id.* at 45.

It would follow from the principles established by these cases and others under the ADEA that the terms and conditions of Harrington's employment could not be limited by age. This Court has held that rights conferred upon an employee by an employment contract constitute terms or conditions of employment under federal anti-discrimination law. In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), this Court held that TWA's transfer policy for captains, which allowed captains (until they reached age sixty) to bump less senior flight engineers, was a "privilege" of employment under the ADEA. The Court observed that while the ADEA did not require TWA to adopt a transfer policy, "if TWA does grant some . . . captains the 'privilege' of 'bumping' less senior flight

engineers, it may not deny this opportunity to others because of their age." *Id.* at 120-21. *See also Hishon v. King & Spaulding*, 467 U.S. 69, 74 (1984) (in Title VII case, "[b]ecause the underlying employment relationship is contractual, it follows that 'terms, conditions, or privileges of employment' clearly include benefits that are part of an employment contract"). In this case, Harrington was promised in the Agreement that he could only be discharged for cause and that his job would be preserved in the event of a sale or reorganization of business. These terms cannot, consistent with the ADEA, be limited on the basis of Harrington's age. Notwithstanding, Harrington's benefits under the Agreement came to an end on his seventieth birthday.

This case provides an unusually clear example of privately contracted discrimination. The age-seventy condition had been written into the Agreement in conformity with the ceiling of coverage under the ADEA. Although Aetna had agreed to amend the Agreement once before, when the ceiling of the ADEA rose from sixty-five to seventy, it declined to amend it again after the 1986 amendment to the ADEA eliminated the age ceiling. Rather, Aetna retained the "age 70" term as the condition that ended Harrington's tenure.

The Seventh Circuit panel majority does not perceive the "age 70" term as an age-based limitation to employment under the ADEA. Instead, it reads the Agreement as merely "confer[ing] extraordinary benefits on Harrington for a limited time." Op. at App. 5. The expiration of the Agreement, the majority states, was merely a neutral event unconnected to age (except in the mundane sense that Harrington would be older at the end of the term). Op. at App. 5. The use of age to define the term raises

no alarm, the majority concludes because it "see[s] no magic in the fact that the date [at which the contract expires] here was a birthday, and a seventieth one at that." Op. at App. 6. It is, however, impossible to divorce the duration of employment from the cases cited above, in which employers applied age limits. Otherwise, it would be possible for employers to set age-based "mandatory maximum length of tenure" requirements instead of mandatory retirement policies and thus avoid the ADEA restrictions.

Indeed, the Seventh Circuit's reasoning will undercut the understood premise of all post-1986 ADEA case law, including *Gregory*, that age-based limits to employment are impermissible. The Seventh Circuit's decision effectively creates a safe harbor for employment contracts that expire when the employee reaches some age certain. For example, following the reasoning of the majority below, state legislatures could appoint or elect judges to terms that expire on their seventieth birthdays without running afoul of the federal law, so long as they thereafter are retained for short periods as employees at will. Furthermore, despite the expiration of the higher education exclusion for tenure contracts under the ADEA in 1993, a university under this decision could enforce all preexisting tenure contracts with age seventy expiration clauses, and require tenured faculty members to apply for year to year (or month to month) extensions, the exact practice found objectionable by the Tenth Circuit in *EEOC v. Wyoming Retirement System*, *supra*. ADEA Amendments of 1986, Pub. L. No. 99-592, §6, 100 Stat. 3342 (lifting age ceiling to 70 until December 31, 1992, when the ADEA's affirmative tenure exemption ends).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-1440

RICHARD F. HARRINGTON,

Plaintiff-Appellant,

v.

AETNA-BEARING COMPANY, a wholly-owned subsidiary of Katy Industries, Incorporated, and KATY INDUSTRIES, INCORPORATED,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 C 6179—**James B. Zagel,** *Judge.*

ARGUED NOVEMBER 7, 1990—DECIDED JANUARY 7, 1991

Before BAUER, *Chief Judge*, and POSNER and RIPPLE, *Circuit Judges.*

POSNER, *Circuit Judge.* The Age Discrimination in Employment Act forbids an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). We must decide whether the complaint in this unusual, perhaps unique, case states a claim of discrimination under the Act. Thinking not, the district judge dismissed the suit. 729 F. Supp. 1217 (N.D. Ill. 1990).

In 1971 the plaintiff, Richard F. Harrington, became at the age of 53 the president and chief executive officer of Aetna-Bearing Company, one of the defendants. The other defendant is Aetna's parent, Katy Industries. Why Katy was joined is a mystery to us—there is no suggestion that it had any dealings with Harrington, or that there is any other ground for piercing the corporate veil—but it is a mystery with no significance to our decision.

On the day Harrington became president he signed an employment agreement with Aetna that provided that he would be employed until January 1, 1979, at the salary fixed in the contract and that he could be fired only for cause, defined in terms of five specified forms of misconduct, such as gross and willful neglect of duty. The contract also required Aetna, if it sold its business to another company, to condition the sale on the purchaser's assuming Aetna's obligations under the contract with Harrington.

In 1978, the Age Discrimination in Employment Act was amended to raise the minimum mandatory retirement age from 65 to 70. The following year, Harrington's employment contract with Aetna was amended to extend its expiration date "until the Employee [Harrington] reaches age 70," which would be on August 7, 1988, and also to raise his salary. Oddly, the contract was not amended until July 1, 1979, six months after its expiration. (This is one of numerous, but fortunately irrelevant, puzzles in this case, like why Katy was sued along with Aetna. Another puzzle is whom Harrington negotiated the contract with. The only signatures on the contract besides Harrington's are those of lesser officers of Aetna—Harrington's subordinates. But presumably Aetna's board of directors approved the contract.) In 1986, the Age Discrimination in Employment Act was further amended, to eliminate mandatory retirement ages altogether as of January 1, 1987 (but cf. *Aledo-Garcia v. Puerto Rico National Guard Fund, Inc.*, 887 F.2d 354 (1st Cir. 1989)), with exceptions (one mentioned below) inapplicable to this case.

Some months before his seventieth birthday, Harrington told Aetna's board that he wanted to continue working

after he reached 70 and also wanted the employment agreement extended. Aetna granted the former but refused the latter request. So Harrington's seventieth birthday came and went and he was still on the job but without a contract; he was an employee at will, as apparently he had been for six months in 1979, before the original contract, which had expired, was amended.

Six months after Harrington turned 70 and the contract therefore expired—on February 7, 1989, to be exact—Katy sold Aetna's business, without requiring the purchaser to retain Harrington. He was fired the same day, presumably by the purchaser, although the record is unclear on this point (as on so many others); Harrington attaches no importance to the question. There is no suggestion that he was fired for cause within the meaning of the expired employment contract.

Shortly afterward, and within 300 days after his seventieth birthday, Harrington filed a complaint with the Equal Employment Opportunity Commission, charging that the termination of his employment contract upon his turning 70 violated his rights under the age discrimination law. This lawsuit followed. Although certain corporate officers are excluded from the age discrimination law, 29 U.S.C. § 631(c), the exclusion is of limited scope and we are not told whether it might swallow Harrington. There is a reason we are not told: the exclusion of certain corporate officers is a defense to liability, *Passer v. American Chemical Society*, 701 F. Supp. 1, 2-3 (D.D. C. 1988), and not one of those defenses that a defendant can raise by motion rather than by answer, Fed. R. Civ. P. 12(b)—and the defendants have not yet answered the complaint.

It is important to understand what is not contended in this case. There is no contention that the placing of an age-70 cut-off in the amended employment agreement back in 1979 was an unlawful discrimination on account of age; at that time, persons aged 70 and older were not in the class protected by the age discrimination law. There is no contention that Aetna's refusal in 1988 to extend Har-

rington's about-to-expire contract was motivated by his age. The omission may reflect statute of limitations concerns. To explain, such a contention would imply that the statute of limitations had started to run on the date of the refusal. *Delaware State College v. Ricks*, 449 U.S. 250 (1980). If that date was prior to July 21, 1988, the three hundredth day before Harrington filed his complaint with the EEOC, then if the refusal to renew the contract was the discriminatory act, the suit is time-barred. And in all likelihood the refusal *was* prior to that date. We do not know for sure—this is another gap in the record. But the complaint alleges that Harrington requested renewal early in 1988 and was refused, presumably, although not certainly, shortly after the request was made. But the only thing that is important is that Harrington, for whatever reason, does not contend that the refusal to renew the employment contract upon its expiration was an act of discrimination.

He also does not contend that the sale of Aetna's business was motivated, to even the tiniest extent, by a desire to get rid of him. Indeed, there is no contention that at any stage in Aetna's dealings with Harrington the company was trying to get him to retire. Hence cases such as *Karlen v. City Colleges of Chicago*, 837 F.2d 314 (7th Cir. 1988), on which Harrington relies, are inapposite; in them, the employer is accused of trying to induce early retirement by penalizing the worker who does not take it. It could be that when Aetna extended the contract to age 70, the lowest mandatory retirement age permitted by the Age Discrimination in Employment Act at that time, it intended to make Harrington retire at that age. But it obviously changed its mind when the Act was amended to forbid mandatory retirement at any age, and it made no move to fire or retire Harrington when the contract expired.

Because of all the things the plaintiff does *not* argue, his submission has a Doric simplicity. It is simply this. *Any* contract that has a termination date based on the employee's age—provided only that the age is 40 or more,

for persons under 40 are not protected by the age discrimination law—violates the law. It does so because the termination provision discriminates, per se, on account of age. Moreover, the proper—indeed, the mandatory—remedy for the violation is for the court to strike the termination date and so make the contract run (or compute damages as if the contract would run) until the employee dies or furnishes cause, as defined in the contract, for involuntary termination. The basis on which this extraordinary result is urged is that the type of employment contract involved in this case ties benefits explicitly to age. Before he reached 70, Harrington had a guaranteed salary and could be fired only for cause; after he reached 70, he was an employee at will. Age triggered a reduction in his employment rights. Therefore he was discriminated against on account of his age.

That is one way of looking at the sequence of events in this case but there is another and, it seems to us, as it seemed to Judge Zagel in the district court, a better way. The employment contract conferred extraordinary benefits on Harrington for a limited time. At first the limitation was expressed in months: the original contract signed in 1971 expired by its terms 87 months after it was signed. When it expired, Harrington was seven years older, and, until the contract was extended, poorer in the sense that once the contract expired he lost the protections that it had given him. But would anyone contend that he was discriminated against on account of age because he was older when the contract expired than when he had signed it? That would be the end of employment contracts. Now suppose the contract had been extended another 87 months. Then it would have expired in 1986, when Harrington was 68 years old. Would that expiration be a violation of the age discrimination law? Term contracts of employment are not illegal because the parties are older when the term is up than they were when it began. An employer does not by signing a term contract with an employee commit itself to employ him forever just because when the term is up he will be 40 or older.

The only thing that makes Harrington's claim plausible is that age is mentioned in the contract. But we cannot see a practical difference between fixing a term of years and fixing the date at which the contract expires, and we see no magic in the fact that the date here was a birthday, and a seventieth one at that. A term must begin on a particular day and end on a particular day. Suppose the amended contract had said that it would expire on January 1, 1989—ten years to the day from the expiration of the original contract. Would anyone argue that the company was guilty of age discrimination if it refused on that day to give him lifetime tenure? Yet that is the implication of his argument. We hesitate to set foot on a path that leads inexorably to a legal conclusion which would as a practical matter abolish employment contracts for employees over the age of 40.

That path is avoided by noting that the contract expired not because Aetna made a judgment that Harrington was too old, but because the contract had a definite term and the term had ended. If any judgment was made that septuagenarians in general or Harrington in particular are (is) too old to work, it was made either when the contract was extended in 1979 to Harrington's seventieth birthday or when in 1988, shortly before its expiration, the company rebuffed his request to extend the contract. Either of those decisions may, for all we know, have been motivated by a belief, which the statute forbids an employer to act on, that chronological age determines capacity for work. But neither of those decisions is challenged in this case. Neither, in all likelihood, could be. Certainly the first could not be. The decision in 1979, if it was age discrimination, was lawful age discrimination because mandatory retirement at age 70 had not yet been abolished. The decision in 1988 not to extend the contract before it expired may have been motivated by age discrimination too, but if so the statute of limitations has probably run; in any event Harrington has not challenged that decision. All that he is challenging is an event—the expiration of his employment contract—that occurred not

by virtue of a contemporaneous judgment by the company but as the consequence of decisions *that he does not challenge* taken in previous years—the decision to extend the contract to age 70 in the first place and the decision not to extend the contract in 1988, before it expired.

The *Ricks* decision is instructive. The plaintiff was a college professor who believed that he had been denied tenure for discriminatory reasons. The denial of tenure resulted in the loss of his job a year later when his employment contract expired. The Supreme Court held that the actionable wrong, the wrong that started the statute of limitations running, was the denial of tenure—that is, the discriminatory action—not the loss of the job which followed as a consequence. It is the same here. The last possibly discriminatory action was the refusal by Aetna to extend the expiration date of the contract. That the contract later expired was a consequence of that decision as well as of the earlier decision to make the contract expire when Harrington was 70. The expiration was not the discriminatory act. It was the playing out of the contract's terms.

If an employer had a practice of giving term employment contracts to its executives and renewing the contracts only for the young executives, it would be guilty of age discrimination. Therefore if Aetna had refused to extend Harrington's contract beyond the age of 70 because it thought people over 70 are unreliable, it might well be guilty of age discrimination. If it had fired Harrington when and because he reached 70, or forced him to retire then, the conclusion would be the same. But so far as appears, the only reason Harrington's job protection expired at the age of 70 is that his contract happened to expire on his seventieth birthday rather than after a fixed number of months or years that might have made the contract expire at very nearly the same time.

The purpose of the Age Discrimination in Employment Act is to protect employees from being discriminated against on account of their age. It is not to provide older employees with job security. *Shager v. Upjohn Co.*, 913

F.2d 398, 401 (7th Cir. 1990). There is nothing to indicate that Aetna decided that Harrington was too old to run the company when he reached 70. It made no move to replace him. Of course it may have been influenced, even coerced, by the age discrimination law; but we do not issue demerits to people for obeying laws. Aetna sold the company a few months later but there is not the ghost of a suggestion that Harrington's age had anything to do with the decision to sell. There was no decision by Aetna to retire him, to fire him, to reduce his compensation, or otherwise to discriminate against him on account of his age—no decision, that is, made when his contract expired. If any such decision was made it was made earlier and is not challenged.

We hope that we shall not be misunderstood as suggesting that the withdrawal of a benefit cannot violate the age discrimination law. If an employer says to an employee that when you reach the age of 70 I am cutting your salary in half, it is no defense that the new salary may be twice as high as the salary of an average worker. But Aetna made no judgment, on August 7, 1988, when Harrington's employment contract expired, that Harrington was too old to be entitled to the protections of the contract. Any such decision was made earlier and, to repeat the tiresome but essential refrain of this opinion, is not challenged.

Harrington points out correctly that an employer cannot defend against a charge of age discrimination or any other civil rights violation by showing that the discrimination began before federal law made it unlawful. *Bazemore v. Friday*, 478 U.S. 385, 395 (1986). Discrimination is a continuing wrong. This would be a pertinent point if Aetna had forced Harrington to retire at the age of 70 and defended its action by reference to a contract made before the age discrimination law had been amended to bar mandatory retirement at 70. Aetna has done neither of these things. And where is the past discrimination here? None is alleged. It is not discrimination to offer an employee a contract that does not last forever. It is not discrimina-

tion to offer him a contract that lasts ten years, or until the year 2000, or until his seventieth birthday, provided that at the end of the contractual period you do not fire the person, or subject him to other adverse personnel action, because of his age. The expiration of a contract is not an act of age discrimination.

AFFIRMED

RIPPLE, *Circuit Judge*, dissenting. In my view, the district court disposed of this case prematurely. A motion to dismiss for failure to state a cause of action should be granted only when it is clear that "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). That standard is hardly satisfied here . . . as my brothers' discomfort with the sparseness of the record adequately demonstrates. We ought not retreat into semantical hypertechnicality over what is alleged and what is not alleged in the complaint; permitting the litigation to proceed at least past this initial stage might well shed significant light on the events that precipitated the lawsuit.

At the very least, before affirming this dismissal, it would be prudent to request the views of the EEOC as amicus. Charged with the administration of the statute, that agency might well be able to enlighten us with respect to the applicability of congressional age discrimination policy to executive compensation contracts.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: January 7, 1991

BEFORE: Honorable William J. Bauer, Chief Judge
Honorable Richard A. Posner, Circuit Judge
Honorable Kenneth F. Ripple, Circuit Judge

No. 90-1440

RICHARD F. HARRINGTON,

Plaintiff-Appellant

v.

AETNA-BEARING COMPANY, a wholly-owned subsidiary of Katy Industries, Incorporated and KATY INDUSTRIES INCORPORATED,

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 89 C 6179, Judge James B. Zagel

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

Richard F. HARRINGTON, Plaintiff,

v.

AETNA-BEARING COMPANY, a wholly-owned SUBSIDIARY OF KATY INDUSTRIES, INC., and Katy Industries, Inc., Defendants.

No. 89 C 6179.

United States District Court,
N.D. Illinois, E.D.

Jan. 30, 1990.

* * * * *

MEMORANDUM OPINION AND ORDER

ZAGEL, District Judge.

Harrington was the president of Aetna-Bearing Company, a maker and supplier of ball bearings which was wholly owned by Katy Industries. His employment with Aetna began in 1954 and ended thirty-five years later on February 7, 1989. Harrington had a written employment contract with the company, dated October 1, 1971. The contract set forth compensation and provided for termination for only five types of misconduct. The contract had a duration of 87 months and provided that during the duration of the contract Aetna would cause anyone who purchased its assets to assume Aetna's obligations under the employment contract.

On July 1, 1979 the parties amended the contract to increase the compensation and to extend the duration "until the Employee reaches age 70." Other than this "all terms and conditions of the Employment Agreement will remain in full force and effect until Employee reaches age

70."[1] In 1979 the Age Discrimination in Employment Act (ADEA) did not cover persons aged 70 years.

Several years later, in 1988, prior to August 7, 1988, the expiration date of the contract (Harrington's 70th birthday), Harrington asked to extend the contract. This was not done. August 7 came and went and Aetna continued to employ Harrington as its president. On February 7, 1989, Finson International bought Aetna's assets and thereafter continued Aetna's business. Aetna did not cause Finson to assume the obligations of the contract. Nor did Aetna arrange for Harrington's employment by the new Aetna Bearing Company. Aetna terminated Harrington's employment on February 7, 1989.

The question here is whether the complaint states a cause of action. The first count is one of age discrimination. The obvious difficulty with this claim (as the complaint makes clear) is that Harrington was terminated because the business he ran for Aetna was sold to someone else and not because of his age.

Harrington says that "by treating [the] contract as having expired on his 70th birthday defendants caused a materially adverse change in the terms of his employment because of his age." Harrington's complaint alleges that defendants "refused to extend" the agreement and "enforced . . . the age 70 mandatory termination clause" in the employment contract and that they did so wilfully.

In response, defendants argue, essentially, that by artful use of language (*i.e.*, "treating as expired" and "enforcing") Harrington conveys the image of affirmative acts by Aetna upon which liability may be founded. The truth,

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[1] The contract and its amendment are part of the complaint.

they say, is they did nothing; the contract expired by its own terms. They had nothing to "treat" or "enforce".

The defendants have the better of this argument. Harrington bases his "variation on the garden variety" age discrimination claim—to wit, "because of [his] age, defendants altered [his] contract status, which resulted in his termination"—on the cases sustaining recovery for materially adverse changes. *Spring v. Sheboygan Area School District*, 865 F.2d 883, 885 (7th Cir.1989). *See also Lorance v. AT & T Technologies*, ___ U.S. ___, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989).[2] But there was no change in Harrington's status. On July 1, 1979 he was a man with an employment contract that ran until August 7, 1988 and thereafter a man employed, if at all, without an employment contract. On August 7, 1988 and on February 7, 1989 his status was exactly the same—a man with a contract until August 7, 1988 and a man without a contract thereafter.

There is nothing in the age discrimination law or in the cases which make illegal per se contracts which expire after a contract employee reaches forty. Nor does statute or precedent impose a duty on an employer to extend a contract that expires when the contract employee has turned forty. Absent such law, Harrington's first theory fails. Definitions of "status" are not carved in stone; they are elected by lawmakers and others for a variety of policy reasons. Harrington says the appropriate measure of status is the change in his legal standing from contract employee on one day to non-contract employee on another.

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[2] Defendants do not argue that the change, if any, in status occurred in 1979 and, in any event, under *Lorance* the ADEA claim would be time-barred.

But I find it more appropriate to measure his status in terms of whether Aetna's affirmative act or its failure to fulfill a duty caused Harrington's relation to the company to change from one day to the next. This is so because the law invoked here is violated by acts or omissions of an employer's obligation, the law is not intended to guarantee against all changes in status occurring with the passage of time.

Harrington's age discrimination theory[3] is that defendants' actions of February 7, 1989, when they terminated him, are unlawful because they gave "effect to the now-illegal mandatory retirement clause" in the contract. The problem, of course, is the contract contains no mandatory retirement clause—it contains only an expiration date. The contract does not even require retirement—a fact not in dispute since Harrington remained on the job for half a year after the contract expired and until the business was sold. Harrington simply remained employed without a contract. Unless employment contracts ending after age 40 are per se unlawful, there is no past discrimination to be perpetuated by the failure to extend them.

The second count of the complaint is a state law claim for breach of contract. Where, as here, the federal claim fails, jurisdiction over the state claim should be relinquished unless "it is absolutely clear that the pendent claim can be decided in only one way" in which case "the district judge can and should decide it to save the time of the state court." *Martin-Trigona v. Champion Federal Savings and Loan Ass'n*, 892 F.2d 575 (7th Cir.1989).

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[3] *See Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed. 2d 315 (1986); *Beavers v. Inter'l Assn.*, 701 F.2d 601 (7th Cir.1982).

The plaintiff seeks to enforce two provisions of the expired contract; one requiring discharge for cause and another requiring a buyer of company assets to assume the contract. Harrington's claim depends upon a finding, under Illinois law, that a clause causing expiration of a contract at age seventy is unenforceable. If this is true, then Harrington can enforce the remainder of the contract in his favor, if the unlawful clause is separable from the remainder of the contract. *See Broverman v. City of Taylorville*, 64 Ill.App.3d 522, 21 Ill.Dec. 264, 381 N.E.2d 373 (1978); *Corti v. Fleisher*, 93 Ill.App.3d 517, 49 Ill.Dec. 74, 417 N.E.2d 764 (1981). The questions of severability and enforceability of the remainder of the contract seem not ones that "can be decided in only one way." But what of the illegality, in an employment contract, of a clause ending the contract when the employee reaches age 70? Plaintiff cites no Illinois law that would make mandatory retirement at age 70 an unlawful provision. And here we have no mandatory retirement clause. On the other hand, defendants cite no precedent upholding the validity of the contract clause in this case. While it seems there is little chance Harrington can enforce, in Illinois, a contract after it lapsed under these circumstances, I cannot say the issue is one in which the "state court would have no interest in being permitted to decide for itself." *Martin-Trigona*, at 578.

The federal law claims are dismissed for failure to state a cause of action and the state law claim is dismissed without prejudice to its filing in state court.

[RECEIVED AUGUST 15, 1989]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RICHARD F. HARRINGTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 89 C 6179
	)	
AETNA-BEARING COMPANY, a wholly-owned subsidiary of KATY INDUSTRIES, INC., and KATY INDUSTRIES, INC.,	)	TRIAL BY JURY REQUESTED
	)	
	)	
Defendants.	)	

COMPLAINT

Plaintiff Richard F. Harrington, by his attorneys, brings this action against the named defendants Aetna-Bearing Company and Katy Industries, Inc. and for his claims alleges as follows:

COUNT I—AGE DISCRIMINATION IN EMPLOYMENT

Jurisdiction

1. This court has jurisdiction of this count pursuant to Section 7 of the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. §626.

Venue

2. Venue properly lies within the Northern District of Illinois pursuant to 29 U.S.C. §1391 in that plaintiff resides in this district, defendants Aetna-Bearing Company and Katy Industries, Inc. do business in this district, and many of the acts complained of occurred herein.

Parties

3. Plaintiff Richard F. Harrington was formerly president and the Chief Executive Officer of defendant Aetna-Bearing Company. Mr. Harrington is a citizen of the United States and a resident of Illinois.

4. Defendant Aetna-Bearing Company is a wholly-owned subsidiary of defendant Katy Industries, Inc. Aetna-Bearing Company manufactures and sells ball bearings. Aetna-Bearing Company at all relevant times had its principal place of business in Chicago, Illinois. Defendant Katy Industries, Inc. is a holding company and had its principal place of business in Elgin, Illinois. At all relevant times defendants were engaged in an industry affecting commerce and employed more than twenty people.

5. Defendants Aetna-Bearing Company and Katy Industries, Inc. are "employers" within the definition of that term at 29 U.S.C. §630(b).

6. Plaintiff Harrington was employed by Aetna-Bearing Company from February 1954 to February 7, 1989. He became 70 years of age on August 7, 1988 and has been more than 40 years of age at all times relevant to this complaint and is therefore within the protected age group as defined in the ADEA, 29 U.S.C. §631.

7. On October 1, 1971 Mr. Harrington and Aetna-Bearing Company entered into an employment contract, which

provided that he would be employed as President of Aetna-Bearing Company for eighty seven (87) months. (Exhibit A, ¶¶ 2, 4.) The employment contract and its subsequent amendment shall hereinafter be referred to as the Employment Agreement. (A true and complete copy of the October 1, 1987 Employment Agreement is attached as Exhibit A.)

8. The Employment Agreement also provided that Aetna-Bearing Company could terminate Mr. Harrington's employment "for cause," which was defined as consisting of five types of misconduct. (Exhibit A, ¶10.)

9. The Employment Agreement also provided that if during the contract term Aetna-Bearing Company should sell substantially all of its assets, Aetna-Bearing Company will "cause its obligations under said agreement to be assumed by such purchaser or purchasers of those assets." (Exhibit A, ¶12.) The Employment Agreement further provided that "the rights and obligations of Aetna under this Employment Agreement shall inure to the benefit of and shall be binding upon the successors and assigns of Aetna." (Exhibit A, ¶13.)

10. On July 1, 1979 Aetna-Bearing Company and Mr. Harrington amended the Employment Agreement. The amendment provided that "all terms and conditions of the Employment Agreement will remain in full force and effect until Employee reaches age 70." (A true and complete copy of the amendment is attached as Exhibit B.)

11. In early 1988, prior to his 70th birthday, Mr. Harrington informed Aetna-Bearing Company that he wished to work beyond age 70 and asked that the Employment Agreement be extended. Defendants refused to extend the Employment Agreement. Instead, from the date of his 70th birthday on August 7, 1988, defendants have enforced

of the age 70 mandatory termination clause in the Employment Agreement, have considered the Employment Agreement as ended, and have treated Mr. Harrington as if he were an employee at will.

12. On February 7, 1989 Finson International, Inc., a holding company formed solely for the purpose of acquiring Aetna-Bearing Company, purchased substantially all of the Aetna-Bearing Company's assets from defendant Katy. Finson International, Inc. thereafter continued Aetna-Bearing Company's business. Defendants did not condition the sale on Finson's assumption of Aetna-Bearing's obligations under the Employment Agreement, as required by ¶12 of the Employment Agreement. Nor did defendants otherwise cause Finson to be bound by the Employment Agreement, as required by ¶13 of the Employment Agreement.

13. On February 7, 1989 defendants terminated Mr. Harrington's employment, on a basis other than cause as defined by the Employment Agreement.

14. But for Mr. Harrington's age, Mr. Harrington's employment contract would have bound defendants to condition the sale of Aetna-Bearing on Mr. Harrington's continued employment which would have either (a) on sale ensured his continued employment with the new owner, or (b) would have prevented a sale, which would have ensured his continued employment with the present owner. Defendants therefore wrongfully, willfully and knowingly used age as a determining factor in terminating Mr. Harrington, in violation of Sections 4(a)(1), 4(a)(2) and 4(f)(2) of the ADEA, 29 U.S.C. §§623(a)(1), 623(a)(2) and 623(f)(2).

15. All conditions precedent to the institution of this lawsuit have been fulfilled. Charges alleging unlawful discrimination pursuant to 29 U.S.C §626(d) were timely filed

with the Equal Employment Opportunity Commission and the Illinois Human Rights Commission within 300 days of the date of the violation and more than sixty days prior to the commencement of this action.

WHEREFORE, plaintiff prays that the court:

A. Enter an order finding and declaring that defendants have violated Sections 4(a)(1), 4(a)(2) and 4(f)(2), 29 U.S.C. §§623(a)(1), 623(a)(2) and 623(f)(2).

B. Require the defendants retroactively to reinstate the plaintiff with participation in all employee benefit plans and with all other benefits which would have accrued if plaintiff's employment had not been wrongfully interrupted.

C. Grant plaintiff damages equal to the compensation and employment benefits he has lost as a result of defendants' unlawful conduct.

D. In light of defendants' willfulness, grant plaintiff liquidated damages equal to the amount of his actual damages and in addition to his actual damages.

E. Grant plaintiff his costs and expenses of maintaining this action, reasonable attorney's fees, expert witnesses costs, and pre- and post-judgment interest.

G. Grant such other and further relief as this court deems necessary to effectuate the purpose of the Age Discrimination in Employment Act.

COUNT II

BREACH OF CONTRACT

16. This court has jurisdiction over this count under principles of pendant jurisdiction.

17. Plaintiff realleges and incorporates by reference in this Count II paragraph 2 through 13 of Count I of this Complaint.

18. Defendants breached their employment contract with plaintiff by (a) terminating him for reasons other than cause as specified by the Employment Agreement, and (b) failing to cause Finson International, Inc. to assume or otherwise be bound by defendants' obligations to plaintiff under the Employment Agreement.

19. As a result of defendants' wrongdoing, plaintiff has lost substantial amounts in salary and other employment benefits.

WHEREFORE, plaintiff prays that the court:

A. Grant plaintiff damages equal to the compensation and employment benefits he has lost as a result of defendants' unlawful conduct.

B. Require the defendants retroactively to reinstate the plaintiff with participation in all employee benefit plans and with all other benefits which would have accrued if plaintiff's employment had not been wrongfully interrupted.

C. Grant such other and further relief as is just and equitable.

Respectfully submitted,

/s/ Thomas R. Meites
One of the attorneys for the plaintiff

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Joan H. Burger
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(312) 263-0272

EMPLOYMENT AGREEMENT

This Employment Agreement made as of this 1st day of October, 1971 by and between AETNA BEARING COMPANY, a Delaware corporation ("Aetna"), and RICHARD F. HARRINGTON, of Chicago, Illinois ("Employee").

WITNESSETH:

WHEREAS, Employee has served as President and chief executive officer of Aetna, and has made a substantial contribution to the operations of Aetna; and

WHEREAS, Aetna desires to retain Employee's services and to use his knowledge and experience, and Employee is willing to provide his services according to the terms set forth in this Employment Agreement;

NOW, THEREFORE, in consideration of the mutual promises herein contained, the parties agree as follows:

1. *Employment.* Aetna hereby employs Employee and Employee hereby accepts employment by Aetna for the term and upon the conditions hereinafter set forth.

2. *Term.* Employment under this Employment Agreement shall be for a term of eighty-seven (87) consecutive months from October 1, 1971 ("Commencement Date"), subject to the provisions stated in paragraphs 6 and 10.

3. *Compensation.* For all services rendered by Employee under this Agreement, Aetna shall pay Employee as follows:

(a) *Base Salary.* Aetna shall pay Employee a salary of $40,000.00 per year, payable in equal installments not less frequently than monthly.

(b) *Incentive Bonus.* Aetna shall pay Employee an incentive bonus which will be accumulated and will be payable in accordance with the Standard Manage-

ment Plan currently in effect for companies, including Aetna, which are affiliated with Katy Industries, Inc. Aetna guarantees that the incentive bonus payable to Employee will not be less than $15,000.00 per year during the period from October 1, 1971 through September 30, 1973. The provisions of this paragraph 3 are subject to the provisions stated in paragraphs 6 and 10 of this Employment Agreement. In addition to the compensation provided for herein, Aetna shall reimburse Employee, on presentation of proper expense vouchers, for such reasonable travel and other expenses as he may incur in rendering services in employment by Aetna.

(c) *Pension.* Employee shall receive the benefits of the Aetna Pension Plan (the "Plan") all in accordance with its terms upon his retirement from employment by Aetna at age 65. In the event Employee retires from the positions of employment herein provided before age 65, then Aetna agrees to employ Employee and Employee agrees to act as a consultant to Aetna until age 65 for not less than 12 days each year and to be bound by the provisions of paragraph 7 hereof until age 65 and for such services Aetna shall pay Employee at a per diem rate of $200 per day, plus travel and other reasonable expenses incurred in connection with Employee's services as such consultant.

4. *Duties.* Employee shall be employed as President and chief executive officer of Aetna, or a position of a similar nature, content and dignity subject to election by the Board of Directors of Aetna, to perform all the duties and obligations described in the By-Laws of Aetna for the president and subject to the further determination of the Board of Directors. Employee's place of employment shall be in the Chicago, Illinois area or such other mutually agreeable place. If the production operations of Aetna are moved outside a radius of 50 miles from State and Madison Streets, Chicago, and Employee does not agree to con-

tinue employment with Aetna at such new location, then Employee shall cease to be employed as President and chief executive officer of Aetna, but shall be employed in a position which utilizes his abilities in the executive, engineering, sales or consulting fields of Aetna's business. In the event of such change in employment, Employee's base salary shall remain unchanged, but the incentive bonus provided in paragraph 3(b) may be determined by the Board of Directors of Aetna.

5. *Extent of Services.* Employee shall devote his entire time, attention, and energies to the business of Aetna and shall not, except as provided below, during the term of this Agreement be engaged in any other business activity whether or not such business activity is pursued for gain, profit, or other pecuniary advantage; but this shall not be construed as preventing Employee from investing his assets in such form or manner as will not require any services on the part of Employee in the operation of the affairs of the companies in which such investments are made. Aetna acknowledges that Employee is part owner of Mars Air Services and consents to the continuation of this relationship as long as it does not interfere with the performance of his duties hereunder during regular business hours.

6. *Limitation.* It is understood and agreed that the right of the Employee to receive and to continue to receive the compensation payments provided in paragraph 3 shall be subject to the condition that he shall have fully performed all the terms and provisions of this Employment Agreement. If therefore, during the term of his employment, the Employee shall die, or he shall become physically or mentally incapacitated or become unable for any reason to perform his duties hereunder and such incapacity or inability, to perform shall continue for a period

of six (6) months, his employment hereunder shall terminate as of the date of such death or as of the end of such period, as the case may be, and Aetna shall be without further liability under this Employment Agreement to such Employee, his heirs or personal representatives, except that it shall remain liable for such salary and bonus as may have accrued to him up to the date of such termination.

7. *Covenant Not To Compete.* Employee agrees that during a period of two (2) years following the date upon which he shall cease to be an employee of Aetna for any reason, he will not engage in any business activity, or acquire any interest, directly or indirectly, in any United States firm or corporation, which is competitive with the business of Aetna in any area in which Aetna has engaged in manufacturing or selling activities within the three-year period prior to the termination of his employment; *provided, however,* that this covenant shall not preclude the Employee from acquiring and owning any security listed on any national securities exchange or which is traded in the over the counter market. The Employee acknowledges that any remedy at law for breach of this covenant shall be inadequate and that Aetna will be entitled to injunctive relief with respect thereto.

8. *Trade Secrets and Confidential Information.* Employee agrees that he will not, except as may be required in connection with his employment by Aetna, directly or indirectly, use or disclose to any other person, firm or corporation, whether during or subsequent to the term of his employment by Aetna, any information of a proprietary nature belonging to Aetna which could be reasonably expected materially to damage Aetna, including but not limited to, records, data, documents, processes, specifications, methods, inventions, patentable ideas, manufac-

turing techniques, formulae, experimental or developmental work, work in process, investigations or other matters relating to the products, customers, sales or business of Aetna. All records, files, drawings, documents, equipment and the like relating to Aetna's business which the Employee shall prepare, use, construct or observe, shall be and remain the sole property of Aetna, and upon termination of this Agreement or the employment hereunder, Employee shall return to the possession of Aetna any items of that nature or copies thereof which he shall have in his personal possession.

9. *Inventions and Patents.* The Employee agrees that he will promptly and fully disclose to Aetna or its authorized representatives, all inventions, improvements, ideas, concepts, discoveries, methods, processes, and devices related in any way, however remote, to the business in which Aetna is engaged, which are or shall be made, discovered, invented, developed or improved, in whole or in part, by him, alone or jointly with others, during the term of his employment by Aetna, or within six (6) months thereafter. Employee further agrees to assign, transfer and convey without further consideration, all right, title and interest which he may have thereto to Aetna as the sole and exclusive owner thereof; and that he will thereafter at any and all times cooperate fully with Aetna in any efforts it may undertake to obtain patents or trademarks with respect thereto or to protect its rights therein.

10. *Termination.* Notwithstanding any other provision hereof, Aetna may, immediately and without prior notice to Employee, terminate this Employment Agreement for cause. For this purpose, "cause" shall consist of:

(a) Employee being convicted of a felony;

(b) Gross and wilfull neglect of his duties under this Employment Agreement by Employee;

(c) Gross and wilfull negligence in the performance of his duties under this Employment Agreement by Employee;

(d) Willful and deliberate breach of this Employment Agreement by Employee;

(e) Wilfull or repeated disregard of the directions of the Board of Directors by Employee.

Upon such termination, Aetna shall remain liable to Employee for salary and bonus accrued to the date of such termination.

11. *Vacations; Benefits.* Employee shall be entitled each year to a vacation in accordance with Aetna's policies governing vacations, and shall be entitled to all other employee benefits customarily provided to employees holding the position with Aetna held by Employee.

12. *Sale of Assets.* If during the term of this Employment Agreement Aetna shall sell all or substantially all of its assets to a single purchaser or to a group of associated purchasers, Aetna agrees it will cause its obligations under said agreement to be assumed by such purchaser or purchasers of those assets.

13. *Assignability.* This Employment Agreement shall not be assignable by the Employee. The rights and obligations of Aetna under this Employment Agreement shall inure to the benefit of and shall be binding upon the successors and assigns of Aetna.

IN WITNESS WHEREOF, the parties hereto have caused this Employment Agreement to be executed as of the day and year first above written.

AETNA BEARING COMPANY

By /s/ L. E. Cella
Vice President

Attest:

/s/ Warren A. Ourst
Secretary

/s/ Richard F. Harrington
(SEAL)

AMENDMENT TO EMPLOYMENT AGREEMENT

This Amendment is made as of July 1, 1979 to the Employment Agreement, dated October 1, 1971, by and between Aetna Bearing Company, a Delaware corporation ("Aetna") and Richard F. Harrington of Chicago, Illinois ("Employee").

Aetna and Employee agreed as follows:

1) The Employment Agreement will continue until the Employee reaches age 70.

2) The base salary beginning July 1, 1979 will be $60,000.00 per year, payable in equal installments not less frequently than monthly.

3) Other than the above changes, all terms and conditions of the Employment Agreement will remain in full force and effect until Employee reaches age 70.

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be executed as of the day and year first above written.

AETNA BEARING COMPANY

By /s/ W. H. Murphy
Treasurer

Attest:

/s/ Warren A. Ourst
Secretary

/s/ Richard F. Harrington
(Seal)

Supreme Court, U.S.
FILED
APR 4 1991
OFFICE OF THE CLERK

(2)

No. 90-1449

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD F. HARRINGTON,

Petitioner,

v.

AETNA-BEARING COMPANY, a wholly-owned subsidiary of Katy Industries, Incorporated, and KATY INDUSTRIES, INCORPORATED,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the expiration of an employment contract by its terms when an employee reaches age 70 violate the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.*?

LIST OF PARENT CORPORATIONS AND SUBSIDIARIES OF RESPONDENTS

Respondent Aetna-Bearing Company (now known as Aetna Liquidating Company)

Parent corporation: Katy Industries, Inc.

Aetna has no subsidiaries

Respondent Katy Industries, Inc.

Katy Industries, Inc. has no parent corporation

Subsidiaries (other than wholly-owned subsidiaries):

Bee Gee Holding Company, Inc.
C.E.G.F. (USA), Inc.
Compagnie des Entrepots et Gares Frigorifiques
Duckback Industries, Inc.
Finson International, Inc.
Schön & Cie, AG
Syratech Corporation

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No. 90-1449

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OCTOBER TERM, 1990

RICHARD F. HARRINGTON,

Petitioner,

v.

AETNA-BEARING COMPANY, a wholly-owned subsidiary of Katy Industries, Incorporated, and KATY INDUSTRIES, INCORPORATED,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Aetna-Bearing Company ("Aetna") and Katy Industries, Inc. ("Katy") respectfully pray that this Court deny the petition for writ of certiorari to review the judgment and opinion entered in this proceeding by the United States Court of Appeals for the Seventh Circuit.

REASONS TO DENY THE WRIT

A. Misstatements Of Fact And Law

In a strained attempt to bring this case under the rubric of Rule 10 of this Court, the petition of Richard F. Harrington ("Harrington") contains a number of misstatements of fact and law. When these misstatements are exposed, it becomes obvious that there is no reason to grant the petition.

First, the thrust of Harrington's claim in the petition is that mandatory retirement constitutes a violation of the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* (1967) (the "ADEA"). Harrington's reliance upon mandatory retirement cases, and his suggestion that this is a mandatory retirement case, constitute a glaring misstatement. Both the Seventh Circuit and the District Court held that this is not a mandatory retirement case:

> Indeed, there is no contention that at any stage in Aetna's dealings with Harrington the company was trying to get him to retire. Hence cases such as (citation omitted), on which Harrington relies, are inapposite; in them, the employer is accused of trying to induce early retirement by penalizing the worker who does not take it. . . . (Aetna) made no move to fire or retire Harrington when the contract expired.

Harrington v. Aetna-Bearing Company and Katy Industries, Inc., 921 F.2d at 717, 719 (7th Cir. 1991).

> The problem, of course, is the contract contains no mandatory retirement clause—it contains only an expiration date. The contract does not even require retirement—a fact not in dispute since

> Harrington remained on the job for half a year after the contract expired and until the business was sold.

Harrington v. Aetna-Bearing Company and Katy Industries, Inc., 729 F. Supp. 1217, 1219 (N.D. Ill. 1990).

Second, contrary to Harrington's references (Petition, pp. 3, 4, 6, 8, 9), this is not a case involving "tenure," "duration of employment" or termination of employment. It simply involves an employment contract with one person which expired by its terms. Harrington's employment did not end when the contract expired; all that ended was Harrington's *employment under the contract.*

A third misstatement is Harrington's suggestion (Petition, pp. 4, 6, 8) that Aetna took some action or made some decision on August 7, 1988, when Harrington's employment contract expired. As the District Court recognized, the ADEA and interpretative case law deal with actions or conduct by an employer:

> But I find it more appropriate to measure Harrington's status in terms of whether Aetna's affirmative act or its failure to fulfill a duty caused Harrington's relation to the company to change from one day to the next. This is so because the law invoked here is violated by acts or omissions of an employer's obligation, the law is not intended to guarantee against all changes in status occurring with the passage of time.

729 F. Supp. at 1218.

Harrington's petition evidences his continued improper characterization of the expiration of his employment contract as conduct by his employer in order to attempt to invoke the protection of the ADEA. Harrington artfully uses language which purports to convey the image of af-

firmative acts by Aetna on August 7, 1988: Aetna "considered his employment contract at an end" (Petition, p. 4), Aetna "cause(d) . . . promises to expire" (Petition, p. 6) and Aetna "retained the 'age 70' term . . ." (Petition p. 8) Indeed, Harrington couches the question presented for review in his petition in terms of his employer's "enforce(ment)" of an employment contract. (Petition, p. 1)

But the Seventh Circuit properly rejected this approach and recognized that Aetna took no action and made no decision on August 7, 1988. The contract simply expired by its terms:

> [T]he contract expired not because Aetna made a judgment that Harrington was too old, but because the contract had a definite term and the term had ended . . . There was no decision by Aetna (when the contract expired) to retire him, fire him, to reduce his compensation or otherwise to discriminate against him on account of his age . . .

921 F.2d at 720.

Finally, it is clear that the sole basis of Harrington's claim was the expiration of his contract on August 7, 1988. Harrington's suggestion now that his claim was also based on Aetna's earlier refusal to extend or amend the contract (Petition, p. 8) is a misstatement of the record. As the Seventh Circuit acknowledged, Harrington "does not contend that the refusal to renew the employment contract upon its expiration was an act of discrimination." 921 F.2d at 719. Nor could that "refusal" be challenged; it is barred by the statute of limitations. 921 F.2d at 719-720.

B. The Petition Does Not Satisfy The Requirements Of Supreme Court Rule 10

A careful reading of the Seventh Circuit opinion in conjunction with the ADEA and the Supreme Court and Appellate Court cases cited by Harrington demonstrates that none of the Supreme Court Rule 10 considerations are met. While the Rule's list of factors is not exhaustive, it is clear that Harrington misperceives what the Seventh Circuit did and he has no basis for a certiorari review.

The Seventh Circuit's decision is not in conflict with applicable decisions of this Court nor with any decision of another United States Court of Appeals on the same matter. Moreover, the Seventh Circuit did not decide "an important question of federal law." Sup. Ct. R. 10.

The Seventh Circuit simply decided that the expiration of Harrington's employment contract by its terms when he reached age 70 was not an act of age discrimination. 921 F.2d at 721. The Seventh Circuit found that age did not trigger a reduction in Harrington's employment rights. Instead, the employment contract conferred extraordinary benefits upon him for a limited time. 921 F.2d at 719. The Seventh Circuit properly recognized that it "is not discrimination to offer an employee a contract that does not last forever." 921 F.2d at 721. The purpose of the ADEA is "not to provide older employees with job security." 921 F.2d at 721.

The Seventh Circuit also recognized that the expiration provision fixed by Harrington's 70th birthday was no different than a provision fixed by a term of years. "A term must begin on a particular day and end on a particular day." 921 F.2d at 720. Moreover, the court understood the "extraordinary result" that would occur as the result of Harrington's position. Under Harrington's theory, any

employment contract with a termination date based on an employee's age of 40 or more would violate the ADEA and, therefore, such a contract would have to continue indefinitely. This would "as a practical matter abolish employment contracts for employees over the age of 40." 921 F.2d at 720.

The Seventh Circuit's opinion does not create a "loophole" in the ADEA, nor does it conflict with the ADEA or with cases construing it. Petitioner has cited no cases which hold that the expiration of an employment contract after an employee reaches age 40 is unlawful. "There is nothing in the age discrimination law or in the cases which make illegal *per se* contracts which expire after a contract employee reaches forty." 729 F. Supp. at 1218.

Moreover, the ADEA deals with challenged actions or decisions of employers, not with the expiration of contracts. Since no action or decision took place here, the Seventh Circuit's opinion does not conflict with the cases cited by Harrington in which an action or decision did occur. For this reason, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (employer adopted a transfer policy); *Hishon v. King & Spaulding*, 467 U.S. 69 (1984) (employer decided not to grant plaintiff partnership status based on sex); and *EEOC v. School Board of Pinellas Co.*, 742 F.Supp. 622 (M.D. Fla. 1990) (employer switched employee from continuing to annual contract) are inapplicable.

Nor does the Seventh Circuit's opinion conflict with the mandatory retirement cases cited by petitioner. *Trans World Airlines, supra; Gregory v. Ashcroft*, 898 F.2d 598 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990); *EEOC v. State of Vermont*, 904 F.2d 794 (2d Cir. 1990); *EEOC v. Tennessee Wildlife Resources Agency*, 859 F.2d 24 (6th Cir. 1988); *Schlitz v. Commonwealth of Virginia*, 854 F.2d

43 (4th Cir. 1988); *EEOC v. Wyoming Retirement System*, 771 F.2d 1425 (10th Cir. 1985). Because this is not a mandatory retirement case, those cases do not apply.

Finally, the Seventh Circuit did not decide an important question of federal law. This case simply involves the question of whether the expiration by its terms, of a particular contract between a particular employee and a particular employer, when the employee reached age 70, violated the ADEA. The case is fact specific to a particular contract and certainly does not have widespread application.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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